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in the

Supreme Court

of the

United States

October Term, 1979

AAACON AUTO TRANSPORT, INC.,
Petitioner,

vs.

JUDITH A. MILLER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner, Aaacon, has set forth a Statement of the Case which Respondent does not believe is sufficient, and she would set forth an additional Statement of the Case.

Petitioner has also included a limited Appendix to its Brief, but the facts in this case also appear from an earlier decision of the Trial Court in *Miller v. Aaacon,* 434 F.Supp. 40 (S.D. Fla. 1977). Respondent filed suit in the State Court in Fort Lauderdale, Florida, on June 17th, 1974, and the case was subsequently removed to the Federal Court by Aaacon on July 3rd, 1974 (Ibid). Subsequently, the District Court granted Aaacon's Motion to stay the case pending arbitration on September 12th, 1974, and thereafter, the Trial Court, on its own Motion, set aside the Stay Order and reinstated the case on April 13th, 1976. Aaacon then appealed the Trial Court's decision to the United States Court of Appeals for the Fifth Circuit, and the Fifth Circuit remanded the case to the lower Court for additional findings of fact on the question of whether the Order should be set aside. *Miller v. Aaacon,* 545 F.2d 1019 (5th Cir. 1977). Further proceedings were had before the Trial Court in accordance with the Fifth Circuit's mandate, and the District Court entered its Memorandum Opinion on June 30th, 1977, which is reported at 434 F.Supp. 40.

While Aaacon was contending in the Trial Court and the Fifth Circuit Court that the arbitration provisions of its tariff should be continued to be applied so as to require Plaintiff to arbitrate in New York City,

the United States Court of Appeals for the Second Circuit held that the arbitration clause which was being used by Aaacon, was unlawful and invalid, and its continued use of said arbitration clause was improper, unlawful and a violation of the Interstate Commerce Act. *Aaacon Auto Transport, Inc. v. State Farm Mutual Automobile Insurance,* 537 F.2d 648 (2nd Cir. 1976).

A similar decision was also entered by the Tenth Circuit Court of Appeals against Aaacon in *Aluminum Products Distributors, Inc. v. Aaacon Auto Transport,* 549 F.2d 1380 (10th Cir. 1977), and despite these adverse decisions against it, Aaacon continued to ask for arbitration in the Southern District of Florida, as is recited in the reported decisions of the Trial Court. (A 4a-13a). After the Trial Court adhered to its decision of August 13th, 1976, setting aside a stay of the case, the cause proceeded to a non-jury trial before the United States District Court for the Southern District of Florida, and the Trial Court entered a Judgment in favor of Respondent for the sum of $2,550.00, plus a $250.00 fine assessed against the Petitioner by a prior Order of the Court, and awarded reasonable attorneys' fees in favor of Respondent.

The Trial Court found that the Petitioner's acts in the Court were reprehensible, unduly prolonged the litigation, and followed a pattern of the type of behavior noted by the Interstate Commerce Commission in the proceedings before it (A 10a-11a).

SUMMARY OF ARGUMENT

Attorneys' fees may be awarded under the decisions of this Court under the inherent power of the Court, where the opposing party has acted in bad faith, not only in the actions which led to the filing of the law suit, but in the conduct of the litigation, and the District Court and the United States Court of Appeals for the Fifth Circuit had ample authority to authorize the allowance of attorneys' fees against Aaacon in this case under the decision of this Court in *Roadway Exp., Inc. v. Piper,* 100 S.Ct. 2455 (1980), and the cases cited therein.

Attorneys' fees may also be awarded against Petitioner as a result of its action in attempting to unlawfully attempt to limit its liability in violation of *49 U.S.C.* Para. 20(11), under the provisions of *49 U.S.C.* Para. 8, as applied to the Petitioner by *49 U.S.C.* Para. 319, which provides that the provisions of *49 U.S.C.* Para. 20(11 & 12), as well as any appropriate provisions of *Chapter 1,* including penalties, necessary for the enforcement are made applicable to motor carriers.

Aaacon's continued unlawful attempt to use an arbitration clause which was clearly invalid under the Act, was such an unlawful attempt to limit its liability as would authorize the imposition of attorneys' fees under the provisions of the above Statutes.

ARGUMENT

In its argument, Petitioner states that the Trial Court may not make an equitable award of attorneys' fees and that the provisions of the Statutes preclude such an equitable award. In its recent decision in *Roadway Exp., Inc. v. Piper,* 100 S.Ct. 2455 (1980), this Court dealt with the question of an award of attorneys' fees where attorneys' fees were not authorized under the Statutes relating to Civil Rights litigation. In that case, the Court stated as follows:

> "Of course, the general rule in federal courts is that a litigant cannot recover his counsel fees. See *Alyeska Pipeline Co. v. Wilderness Society, supra,* 421 U.S., at 257, 95 S.Ct., at 1621. But that rule does not apply when the opposing party has acted in bad faith . . ."
>
> "The bad faith exception for the award of attorneys' fees is not restricted to cases where the action is filed in bad faith. " '(B)ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. . . ." 100 S.Ct. 2464.

Consequently, under the above decision of the court, the Trial Court had ample authority to award attorneys' fees against the Petitioner for its bad faith action which resulted in the filing of the suit and its actions in connection with the conduct of the litigation.

In this case, the Trial Court found that attorneys' fees were justified, where a losing party has acted in "bad faith, wantonly, or for oppressive reasons," and the

Trial Court cited the decision of the Supreme Court in *Alyeska Pipeline Co.*, supra, which was cited as authority for the Court's statement in *Roadway Exp., Inc.*, supra.

The extent of the bad faith of the Defendant is shown by reference to the Trial Court's decision in this matter. In its opinion, the Court stated as follows:

> "The court has also considered the evidence of AAACON's conduct subsequent to the filing of suit, which plaintiff claims supports a finding of punitive damages. The court finds that defendant's tactics in this court of gruding retreat, rock by rock, fence row by fence row — usually with another defense not pleaded before — combined with their failure to inform this court or the Fifth Circuit Court of Appeals of pertinent decisions concerning the validity of defendant's arbitration clause have unduly prolonged this litigation. The court must observe that defendant has established a pattern of this type of behavior . . .
>
> See also *Aluminum Products Distributors v. AAACon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977) (concluding paragraphs of opinion). This conduct, repeated in the case sub judice, is reprehensible.
>
> Defense counsel may have felt that they were merely acting in the interests of their client, and were not technically evading any ethical duties. However, counsel has an obligation as

> an officer of the court to inform the court of significant developments in the law — even if not controlling precedents required to be disclosed by D. Rule 7-106(A)(1) which would affect the court's decision in a case and might avoid protracted and piecemeal litigation such as occurred here. Only because the other decisions were not controlling on this court does the court conclude defendant's conduct of the litigation does not support an award of punitive damages." (A 10a-11a).

In its decision, the Trial Court considered Plaintiff's claim for an award of punitive damages against the Defendant, because of Defendant's bad faith in its conduct of the litigation, and in particular, that the Defendant had failed to inform the Fifth Circuit Court of Appeals of pertinent decisions concerning the validity of Defendant's arbitration clause which Defendant had urged in the Trial Court and on appeal and which resulted in substantial delay in the litigation. (A 10a-11a). This same review of the reprehensible conduct of the Defendant in connection with the litigation was also discussed in the Trial Court's earlier Memorandum Decision in the case, when the Trial Court affirmed its prior Order setting aside a stay of the case and the Trial Court found that the arbitration clause was invalid and that Defendant had improperly used said arbitration clause in the lower Court and in the Fifth Circuit Court of Appeals. See *Miller v. Aaacon,* 434 F.Supp. 40 (S.D. Fla. 1977).

Aaacon's conduct in the case constituted an intentional and unlawful violation of several *provisions of the Interstate Commerce Act.* First, there was a direct

violation of *Section 20(11),* which provides that any limitation with respect to the manner or form with which an action was brought, is declared to be unlawful and void, and this was the holding of the Second Circuit Court of Appeals in *Aaacon Auto Transport, Inc. v. State Farm Mutual Automobile Ins.,* 537 F.2d 648 (2d Cir. 1976), and the Tenth Circuit Court of Appeals in *Aluminum Products Distributors v. AAACon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977). Aaacon's conduct before the Trial Court was so reprehensible that the District Court and the Fifth Circuit Court of Appeals were not reluctant to authorize the award of attorneys' fees because of Aaacon's bad faith.

In the *State Farm* case, supra, the Second Circuit Court of Appeals discussed the fact that the Chief of the Interstate Commerce Commission, Tariff Section, had rejected the tariff filed by Aaacon which contained the arbitration clause, it being a violation of *Section 20(11),* and such a rejection became the action of the Commission; and consequently, Aaacon's continued use of said tariff was a violation of *Section 317,* so its use since that time has been improper and unlawful and in violation of the Act (P. 655-657). In addition, Aaacon was found to be in violation of said provisions of the Act by the Commission in 1976 (Report of Interstate Commerce Commission dated April 19, 1976, 124 M.C.C. 493-511-4 122-141), and Aaacon was ordered to cease and desist from using said tariff. The Second Circuit Court of Appeals denied certiorari. *Aaacon Auto Transport, Inc. v. ICC,* 553 F.2d 93 (2d Cir. 1977). Aaacon repeatedly failed to call these decisions to the attention of both the District Court and the Fifth

Circuit Court of Appeals, and this was discussed by the Trial Court when it noted that the Defendant is a closely-held family corporation, represented in Court by the family law firm (P. 10a-11a).

The record before the Trial Court and the Court of Appeals was replete with the bad faith conduct of the litigation by the Defendant in this cause. For example, even though Aaacon's tariff had been determined violative of the provisions of the Act, Aaacon filed a suit in the United States District Court, Eastern District of New York, in June, 1976, against the Respondent to compel arbitration in the Eastern District of New York, while, at the same time, it sought to compel arbitration in the United States District Court for the Southern District of Florida in this case. In order to further illustrate the bad faith of Aaacon in this case, it will be seen from a review of the proceedings before the Interstate Commerce Commission that Aaacon contended that the arbitration clause did not legally require arbitration in the City of New York, but as the Second Circuit Court of Appeals pointed out in the *State Farm* case, supra, a person would be led to the conclusion that arbitration must be held in New York City (P. 659). Despite those positions in those two Courts, in this case, the Trial Court, as well as the Fifth Circuit Court of Appeals, were led to believe by Aaacon that the arbitration clause did require arbitration in New York City, and as a result of such position, the Trial Court entered a Stay Order, requiring the parties to arbitrate in New York City.

In addition to the Trial Court's inherent authority to award attorneys' fees because Aaacon had acted in bad faith or for oppressive reasons, attorneys' fees could also be awarded Respondent under *Section 49 U.S.C.A., Para. 8,* because of Aaacon's violation of *49 U.S.C. 20(11), 49 U.S.C. Para. 319,* and *49 U.S.C. Para. 316.* Under *Para. 8 of Title 49,* it is provided that an aggrieved party is entitled to its full amount of damages caused by any violation of the provisions of said Chapter, together with an award of attorneys' fees. *Para. 20(11) of Title 49* makes it unlawful for any carrier to attempt to limit liability, except as is specifically authorized by said section. *Para. 319 of Title 49* expressly applies the provisions of *Title 49, U.S.C. 20(11),* to motor carriers, "together with such other provisions of Chapter 1 of this Title (including penalties) as may be necessary for the enforcement of such provisions . . . to common carriers by motor vehicles with like force and effect . . . ." Aaacon's conduct in this case was an intentional and unlawful violation of the several provisions of the Interstate Commerce Act. First, it was a direct violation of *Para. 20(11),* when it provides that any limitation with respect to the manner or form with which an action was brought, is declared to be unlawful and void, and this was the holding of both the Second and Tenth Circuits in *Aaacon v. State Farm,* supra, and the *Aluminum Products* case, supra. It is a direct violation of the specific provisions of *Para. 49 U.S.C. 317(a),* which provides that the Commission may reject any tariff filed with it and any tariff so used shall be void and its action unlawful. The attorneys' fee provision of *Para. 8, Title 49,* is a penalty provision to compel compliance with

Para. 20(11), Title 49, and other sections of the Act and it is included in Part 3 of the Act by *Para. 319, Title 49,* to enforce compliance with the Act.

In this case, the Defendant has continuously sought to invoke the arbitration clause in its bill of lading in an unlawful and illegal manner so as to require Respondent to arbitrate her claim in the City of New York. When arbitration proceedings were attempted by Respondent as a result of Aaacon's efforts, Aaacon again showed bad faith in connection with those proceedings. (See Trial Court's decision at 434 F.Supp. 40.)

Even though Aaacon was prohibited from continuing the use of the arbitration clause and it had been ordered to cease and desist from using said tariff, it continued to use said arbitration clause in the proceedings in the lower Court or the District Court in this case and in the Fifth Circuit Court of Appeals, all of which action was improper, unlawful and would authorize the award of attorneys' fees under the above Statutes.

Regardless of whether the Trial Court awarded the fees under the specific provisions of the Act or under its inherent power, the attorneys' fees award was proper and justified under the evidence in the case, and Petitioner has failed to show the necessary considerations required under *Rule 17* of the *Supreme Court Rules* for the granting of a Writ of Certiorari. In its decision, the Trial Court found that the use of the arbitration clause in this case caused Respondent to expend unnecessary expense and attorneys' fees by prolonged litigation and Respondent was entitled to an award of reasonable attorneys' fees under *49 U.S.C.*

Para. 8 (A 11a-12a). In addition, the Trial Court found that attorneys' fees were appropriate because Defendant had acted in bad faith, wantonly, or for oppressive reasons (A 12a).

Clearly, under the decision of the Court in *Roadway Exp., Inc.*, supra, the Trial Court was authorized to award attorneys' fees where a party had acted in bad faith, either prior to the commencement of the litigation or in connection with the proceedings before the Court. Since the award of attorneys' fees is clearly authorized by the Court's decision as an inherent power of the Trial Court, where the litigation had been conducted in bad faith by the Defendant, the necessary requirements for the granting of a Petition for Writ of Certiorari under *Rule 17,* are not present; and accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth in this Brief, it is respectfully submitted that Petitioner has failed to show the necessary prerequisites for the granting of a Petition for Writ of Certiorari, as are set forth under *Rule 17* of the *Supreme Court Rules;* and accordingly, the Petition should be denied. In addition, for the reasons set forth in an accompanying Motion for the award of attorneys' fees, it is respectfully requested that the Court will grant Respondent's Motion for an award of attorneys' fees against Petitioner.

Respectfully submitted,

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